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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1368

CONSOLIDATED CARRIERS CORP., and/or
TRUCKING PERSONNEL, INC.,

Petitioners,

—against—

CLOAK DRESS DRIVERS AND HELPERS UNION LOCAL 102,
INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT

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Petitioners,

—against—

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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MEMORANDUM OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT

Consolidated Carriers Corp. ("Petitioner"), which is admittedly bound by a collective bargaining agreement with respondent, Cloak, Dress Drivers & Helpers Union, Local 102, International Ladies' Garment Workers' Union, AFL-CIO ("Local 102"), seeks to stay a pending arbitration brought against it for violations of the collective bargaining agreement. Both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit rejected Petitioner's application based upon this Honorable Court's decision in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964).

1. Petitioner's major reason for seeking a writ is that this Honorable Court's decision in *Carey* v. *Westinghouse*

Electric Corp., supra, should be re-evaluated and overruled. That 15 year-old decision has been a hallmark of labor law, standing for the proposition that arbitration proceedings under a collective bargaining agreement advance the statutory objective of promoting industrial peace and stability. Petitioner advances no viable reason for abandoning this basic labor law principle.

2. The facts underlying this case are set forth in full in the District Court's decision (Appendix B). Petitioner admits being bound by a collective bargaining agreement with Local 102 which contains a broad arbitration clause providing for the arbitration of all complaints, disputes and grievances between Local 102 and Petitioner. There are no exceptions to this arbitration clause. The collective bargaining agreement vests in the Arbitrator the power to determine whether Petitioner has utilized a scheme or device to avoid or evade the provisions of the agreement by its transactions with an affiliate or subsidiary firm. Local 102 filed a complaint with the Arbitrator charging that Petitioner, by or through its affiliated or subsidiary firm, Trucking Personnel, Inc., has violated the agreement by underpaying its workers, failing to provide contractual holidays and vacations, failing to make appropriate contributions to health, welfare and pension funds on behalf of such workers and other violations. The issues raised in this complaint are standard issues for any industry-wide Arbitrator to determine and, unless there is a specific exemption for the determination of such issues in the arbitration agreement, the Arbitrator should be permitted to rule on those complaints.

3. The grievance arbitration procedure has been described as being "at the very heart of the system of industrial self-government." *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960). In the *Warrior & Gulf* case and its companion, *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960), this Court established that the function of the court is limited "to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract" *(United Steelworkers* v. *American Mfg. Co., supra* at 568) and that doubts as to coverage of the arbitration clause should be resolved in favor of arbitration (*United Steelworkers* v. *Warrior & Gulf, supra* at 583).

4. Although it is conceded by Petitioner that it is bound to arbitrate its disputes with Local 102, Petitioner attempts to enjoin the arbitration on the grounds of a pending petition for an election filed with the NLRB by an unrelated union, Local 20408. Petitioner takes the position that the issues raised in the representation proceeding were synonymous with the issues raised by Local 102 in the arbitration proceeding.* This is not true. The issue before the NLRB is whether or not to conduct an election among certain employees of Petitioner while the issue before the Arbitrator is whether or not Petitioner violated its contractual obligations as set forth in the collective bargaining agreement, and if so, the appropriate award to be rendered in order to remedy such violation. Thus, the petition of Local 20408 seeks prospective relief and does not in any way seek relief for the past contract violations of the Local 102 contract. The only forum for obtaining remedial relief for past con-

* The hearing in the representation proceeding has been delayed by the filing of unfair labor practice charges by Local 20408 against Petitioner (but not Local 102). Those charges have not as yet been litigated. To delay contract grievance arbitration during the time it will take the NLRB to resolve both the unfair labor practice charge and the representation proceeding would be an unconscionable denial to the covered workers of their right to have their contract enforced.

tract violations is the arbitration process set forth in the collective bargaining agreement between Local 102 and Petitioner.

5. Arbitration is recognized as an instrument of national labor policy for composing contractual differences and, as a result, this Court has repeatedly upheld the use of the arbitration process even where a similar issue has simultaneously been before the NLRB. See, for example, *Carey* v. *Westinghouse Electric Corp., supra* (1964); *United Steelworkers* v. *Warrior & Gulf Navigation Co., supra.*

6. Even if there were a similarity between the issues set before the arbitrator and before the NLRB, which Local 102 has shown is not true, the statutory scheme as shown by court decisions does not preempt the arbitrator from adjudicating the contract dispute, *Carey* v. *Westinghouse Electric Corp., supra.* As this Court stated in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 452 (1957):

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

See also *Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 511 (1962); *Teamsters Local* v. *Lucas Flour Co.,* 369 U.S. 95, 101 n.9 (1962); *William E. Arnold Co.* v. *Carpenters,* 417 U.S. 12, 16 (1974); S. Rep. No. 105, 80th Cong., 1st Sess., 15-18.

7. Whether or not an election is ordered by the NLRB (and Local 102 believes an election will not be ordered),*

* Local 102 expects the petition filed by Local 20408 to be dismissed because the petition seeks an election in an improper unit and because the petition is barred by the collective bargaining agreement between Local 102 and Petitioner.

Local 102 is entitled to have its rights against Petitioner pursuant to the collective bargaining agreement determined by the Arbitrator with respect to any and all existing or past violations of the agreement by Petitioners. "The authority of the Board and the law of contracts are overlapping concurrent regimes, neither preempting the other." *United Aircraft Corp.* v. *Canal Lodge 700,* 436 F.2d 1 (2nd Cir. 1970).

8. Petitioner argues that the *Carey* decision, *supra,* was based upon the NLRB's determination in *Raley's Inc.,* 143 NLRB 256 (1963), which decision, Petitioner argues, has been overruled. Whether the NLRB is disillusioned with the doctrine of *Raley's, supra,* as claimed by Petitioner is not the issue in this case since the question in *Raley's* was whether the NLRB would defer a representation issue to an arbitrator's award. The question in the instant case is not deferral but whether arbitration should be enjoined. Petitioner is mistaken in its assumption that this Court in *Carey* relied upon the *Raley's* decision. Raley's case was cited by this Court in a footnote in which it discussed the circumstances under which NLRB will defer to arbitrational awards. The *Carey* decision which permits arbitration to proceed is still good law. In *Retail Clerks, Local 588* v. *NLRB,* 565 F. 2d 769 (D.C. Cir. 1977), the Court following *Carey, supra,* held that courts had power to compel contractually authorized arbitration even as to matters that, in whole or in part, concern representational issues. The Circuit Court found that arbitration has a "pervasive, curative effect" even if it is used in a representation matter since the NLRB as well as the parties may benefit from the efforts of an impartial arbitrator's attempt to sort out the facts of the case and interpret the contract. Id. at 777. See also *Carey, supra,* at 272-273.

9. Petitioner annexes as Appendix C a decision by the Regional Director of the Twenty-Second Region of the NLRB in a case involving Interstate Dress Carriers, Inc., an employer wholly unrelated to Petitioner. That decision is irrelevant to the instant application. Petitioner argues that, since the Regional Director held that Local 102's contract was not a bar to a petition for an election in the IDC case, therefore, Local 102's contract with Petitioner cannot bar the election in the instant proceeding. Petitioner misstates the rationale of the IDC decision. The Regional Director found that the Local 102-IDC contract was "not a 'members only' argument on its face." (Appendix C, p. 36a). The contract was valid between the parties but was not properly applied to all employees by Local 102 and therefore it could not bar the election. The Regional Director's decision did not decide whether or not IDC had violated its agreement with Local 102 and, in fact, arbitration proceedings in that case are continuing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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